From: Fitchie, Andrew
Sent: 11 March 2009 22:43
To: mike@[redacted]
Cc: 'Steven Bell'; 'Stewart McGarrity'; Jordan, Stuart
Subject: DAL Piper overview

FOISA Exempt and Legally Privileged

Peer review Process

Mike

My apologies for delay in responding after our call earlier this week. We have been fully engaged in advising **tie** and CEC on various aspects of the evolving situation. Taking the topics we spoke about:

The letter of the 19th February

At this point we had been on the scene for well over two weeks (and as explained, intermittently since as early as late summer 08) advising **tie** in relation to BSC's increasingly belligerent approach to their basic obligation to progress the works but in particular regarding the serial difficulty **tie** was having with BSC over the production of competent and timely Estimates to service the Change mechanic. The letter was drafted with our detailed input at a point where **tie** were under very great pressure to announce that BSC were/were not coming into Princes Street at the week end. The letter was a direct response to BSC's indication that they did not regard themselves as contractually obliged to work on Princes Street for reasons which they did not articulate properly - and had never previously mentioned, before alluding to the fact that there might be a 'problem' at the meeting on the Tuesday that week. I think you will now have the second **tie** letter which formally served notification of DRP on BSC from tie's Rep.

We considered (and still consider) that the letter from David Mackay was an effective Clause 80.13 and 80.15 in relation to the Change and that since nothing had excused BSC from carrying out the original works as programmed in Princes Street , no other **tie** instruction was required - though in the light of later refusal/obfuscation from BSC, very clear **tie** Rep instructions were given to ensure that BSC were instructed that there was no impediment, in terms of a **tie** instruction, to them going on Princes Street.

The Change Order

On the facts as we understand them from **tie** and on the basis of the contract correspondence we have seen, we are satisfied that that (a) BSC had known for sometime that it would not have access to the south side of Princes Street for two weeks (b) had begun mobilising for works and engaging on traffic diversions support (c) in essence was only disagreeing with tie on one element of the evaluation of the Change namely the Preliminaries.Consequently, we do not see an argument of that thin type (in the face of a Clause 80.15/80.13 instruction) holding water as a reason for not proceeding in Princes Street.

The DRP

It is right that BSC have attempted to approach the DRP from the narrowest of perspectives i.e. "we were prevented from agreeing an Estimate by **tie** going to DRP". In our view, this argumentation will fail. **tie** does not agree with the method used for calculating preliminaries, has made this plain and is contractually entitled to refer this.

Its remain obscure what BSC are actually saying in relation to entering and working on Princes Street. A determination in **tie's** favour has three advantages (i) BSC ought to be circumspect about using this approach again to create bargaining positions (ii) any delay and or cost will be to the account of BSC (iii) BSC will be shown to have intentionally chosen to break the Contract.

tie recourse

You asked about other provisions in the contract being available to **tie** on February 19th: Short of bring a court action for specific implement (specific performance in England), **tie** had no other means of compelling BSC to do what they were contractually committed to doing - undertake in a timely and purposeful way programmed work in Princes Street which has necessitated a significant third party public relations exercise Client side, as well as traffic management undertakings to prepare the work site properly for BSC. Their approach to this has been to place all of that work and good will in jeopardy and to cause the project unnecessary reputational damage (which itself is a direct breach of contract - Clause 7.3.16).

BSC's behaviour here was another example of a breach of the extensive 'soft ' obligations in the Contract on partnering, not causing unnecessary disputes, minimising cost, maximising productivity as well as the general and core "proceed with due diligence" duty, all of which **tie** has now cited. We have advised **tie** in relation to the use of Clause 61.1 - which is acceleration at consortium cost and risk on **tie** Rep's instruction. In terms of contractual action by **tie** (ie set off or retention or access to the performance security or Parent Company Guarantees), this was considered and advised on and remains as a set of options.

Very happy to assist with views or input on other questions or specific. Just let us know.

kind regard

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M:
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